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debra.hawkins@bipc.com

1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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5
6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
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10 *Ex parte* BAS ORDING, STEVEN P. JOBS,
11 and DONALD J. LINDSAY
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14 Appeal 2007-4296
15 Application 09/467,074
16 Technology Center 2100
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19 Oral Hearing Held: January 17, 2008
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23 Before HOWARD B. BLANKENSHIP, ALLEN R. MACDONALD, and
24 JEAN R. HOMERE, *Administrative Patent Judges*.
25

26 ON BEHALF OF THE APPELLANTS:
27

28 James LaBarre, Attorney
29 BUCHANAN INGERSOLL & ROONEY PC
30 1737 King Street, Suite 500
31 Alexandria, Virginia 22314-2727
32
33

34 P R O C E E D I N G S

35 JUDGE BLANKENSHIP: Whenever you like.

36 MR. LABARRE: Good morning. The, the invention that is the
37 subject of the present application is a graphical user interface for computers.
38 And, more specifically what it deals with is a, is a bar or light that the user

1of the computer employs to quickly locate and provide quick access to
2applications, folders, files, websites, things that, that the user wants to be
3able to pull-up quickly. And, what the invention really deals with is the fact
4that with the, the increased capability of computers and the wide variety of
5applications that are available on -- for computers now, many users will have
6many different applications, many different windows, many different folders
7sets of data. They want to keep open and available to them all the time. So,
8the problem becomes we can have this bar we have access to all these
9various materials. How do you accommodate this large number of items in a
10limited space of the display screen? So, what the, the application is really
11directed to is a behavior of the bar that accommodates this problem. The bar
12is perhaps similar to the task bar that you might be familiar with Windows at
13the bottom whenever you collapse a window or you have an application
14there's a button on the bottom. The actual implementation of the invention,
15you can see in the Macintosh user interface. I don't know if any of you are
16familiar with Macintosh, but that has an area at the bottom that's called the
17dock and it provides you with access to, to your applications, files, websites
18and the like. The features that are most relevant to the broad claims, at least,
19are depicted in Figures 6 and 7 of the application.

20 Unfortunately, as with many user interface items, since these are static
21figures; they don't really bring out the full appreciation of what this claim
22concept relates to. I do have a live demonstration on a laptop that I can
23show you if you'd like to see it today. It gives a better feel for what the
24invention actually is.

25 JUDGE MACDONALD: Actually, no.

1 MR. LABARRE: Okay.

2 JUDGE MACDONALD: We can't do that.

3 MR. LABARRE: I mean, it would only take a minute, but I can
4 understand that.

5 JUDGE MACDONALD: It isn't, it isn't the time issue that it
6 wouldn't be. It would not be in the record.

7 MR. LABARRE: Well, let me address that that particular issue.
8 There was a, a information disclosure statement that was submitted in, I
9 think, November of 2001 and in that information disclosure statement or
10 accompanying that were screen shots of this demo. And, the information
11 disclosure statement also referred to a compact disc that could be provided
12 to the Examiner if he wanted to see the light demo. The Examiner never
13 actually asked for it, so it sort of in the record, although he never actually
14 saw the demo. But, I understand if you don't want to see it because of that.

15 JUDGE BLANKENSHIP: I think we understand the invention.

16 MR. LABARRE: Okay. So, basically what it is is the idea that you
17 may have a bar with a number of these they're referred to as tiles in the, in
18 the application. You might also think of them as icons; that because you
19 have a large number of them, they're reduced down in size so you can fit
20 them all across the screen. And, the idea is that when you bring the cursor
21 close to this bar, the icon that is closest to your tile that is closest to it
22 expands its size so you can really get a good appreciation of it. And, one of
23 the very nice aspects of it is that it's a dynamic feature so as you move the
24 cursor across the screen, it's almost like a wave, and you see these certain
25 icons increasing in size and others decrease in size.

1 JUDGE MACDONALD: That was -- I don't recall that that's in, in
2the independent claims. Is it the --

3 JUDGE HOMERE: Yeah, it is.

4 JUDGE MACDONALD: I thought only every independent claim
5was limited to only one is increasing in size.

6 JUDGE HOMERE: Yeah well, some of the independent claims
7captured that, but --

8 JUDGE MACDONALD: Say again.

9 JUDGE HOMERE: Some, independent claims capture that; others
10don't. It's captured as repositioning.

11 JUDGE MACDONALD: Oh, okay.

12 JUDGE HOMERE: Repositioning the other tiles --

13 JUDGE MACDONALD: Repositioning, yes, but increasing in size, I
14don't recall seeing that in the independent --

15 JUDGE HOMERE: Oh, no, no, no.

16 MR. LABARRE: That would be if you refer, for example, to Claim
1771. That's one of the independent claims. It talks about a varied
18magnification of plural tiles; I believe is the term it uses. It's the very last
19clause of Claim 71. It says selectively magnifying at least one of said items
20closest to said cursor to a first level and magnifying items proximate --

21 JUDGE MACDONALD: Okay.

22 MR. LABARRE: -- to said one item to other levels less than first
23level. So, that's kind of the peak of the wave. So, the first level would be
24the top of the wave where the cursor is located and the ones on either side of

1it are magnified a little bit less. And, as you get farther away from the
2cursor --

3 JUDGE MACDONALD: Okay.

4 MR. LABARRE: -- less magnification.

5 JUDGE MACDONALD: But, it's not in the other independent
6claims prior to 61?

7 MR. LABARRE: I believe that's the first independent claim that
8brings out that concept, yes.

9 JUDGE MACDONALD: Thank you.

10 MR. LABARRE: Okay. So, the issue that, that really I want to
11discuss with you today is the rejection of the claims under 35 U.S.C. 103
12based on two principle references. Now the briefing in this appeal was done
13prior to the Supreme Court's decision in KSR, and so the briefs are
14addressed to the teaching suggestion motivation standard that was in place at
15that time. And, that's why I wanted to come in on an oral hearing to talk
16about the fact that in their decision in KSR, the Supreme Court basically
17relaxed that standard; made it less rigid in their terms.

18 But, in doing that, they did not totally eviscerate some requirement for
19combining references. They still required some reason bases for putting the
20references together, and if I might just quote from one passage in KSR. The
21Court stated, "Rejections on obviousness grounds cannot be sustained by
22mere conclusory statements, instead there must some articulated reasoning
23with some rational underpinning to support the legal conclusion of
24obviousness." So, I think that still has to be kept in mind as you look at the
25rejection, even in light of the Supreme Court's decision. And, and, we

1basically submit that even with the more relaxed standard, the rejection does
2not meet the necessary criteria.

3 So, turning to the references; there's the Selker (phonetic sp.)
4reference is basically directed to the same area of technology. It's got what
5they call an icon menu bar. In their car it's at the top of the screen, but
6where it's located is irrelevant. And, basic idea behind that is as you bring a
7cursor closer to this bar of icons, one of them will expand in size. So, it
8enables you, in terms of the patent, to capture that icon or conversely for the
9icon to capture the cursor as the cursor comes closer to it. So, the user can
10select the application or whatever object is associated with that expanded
11icon.

12 JUDGE MACDONALD: Could you explain how, with respect to the
13102 rejection, how Claim 30 -- how 35 is not anticipated by the reference?

14 JUDGE HOMERE: It's a 103.

15 JUDGE MACDONALD: I'm sorry, I thought, I thought the
16rejection --

17 JUDGE HOMERE: No, a miscommunication. Yeah, 103 was based
18on the two references.

19 JUDGE MACDONALD: My fault, sorry, could you explain why --
20sorry, why Claim 35 is not obvious then over the references? I recognize
21that Claim 35 is broader than 1, but that's, that's why I'm interested in 35.

22 MR. LABARRE: Okay. Claim 35 recites a computer system
23comprising a display a cursor means for pointing to position within said
24display the user bar rendered onto the display and having plurality of tiles
25associated there with --

1 JUDGE MACDONALD: After that point I'm assuming that's the
2prior art.

3 MR. LABARRE: That's in Selker, definitely. So, the, the
4distinguishing aspect is a processor means for varying a position of at least
5one said plurality of tiles on said display.

6 JUDGE MACDONALD: Can I stop you there for a second? I'm
7assuming that, looking at Selker, is in Selker.

8 MR. LABARRE: I would contest that. Selker keeps the icons in the
9same position. What it does is it enlarges the size of the one icon that is
10closest to the cursor. So, if, for example, when you go through the sequence
11of steps; here's 1, 2 and 3-A of Selker. Basically, what that's showing is the
12user is bringing the cursor within the proximity of the icon bar, and the icon
13that's closet to it is the one that's labeled K. And, as the cursor gets closer
14to that, the K icon expands in size. It's basically shown by the question
15mark. I'm not sure why they use that designation, but that's what's
16expanding size. So, its position on the screen is remaining the same, it's just
17its size that's expanding.

18 JUDGE MACDONALD: Well, isn't that kind of subjective to say its
19position stays the same. I'm looking at the bottom right hand corner of the
20icon and it certainly seems to be changing its position.

21 MR. LABARRE: Well, I guess that comes down to your
22interpretation of the word position.

23 JUDGE MACDONALD: Exactly.

1 MR. LABARRE: I think the, the --you know, it's, it's -- whatever
2the reference location is for the icon stays the same, it's just expanding in
3size relative to that reference like location.

4 JUDGE HOMERE: In the invention itself, the position is defined as
5what exactly?

6 MR. LABARRE: Pardon me.

7 JUDGE HOMERE: The position in the invention itself, you say the
8claim calls for a processing the means for varying the position for at least
9one of plurality of tiles. Do you not mean that as the cursor gets close to the
10bar, to a particular tile on the bar that, the tile starts expanding?

11 MR. LABARRE: The term position is not referring to the expansion
12per se of a particular tile. What we're really talking about is -- if you go to
13say Figure 6.

14 JUDGE HOMERE: Yes.

15 MR. LABARRE: And, this particular example is where the cursor is
16over the icon that's labeled the clock.

17 JUDGE HOMERE: Okay.

18 MR. LABARRE: So, if you look, for example, at the right hand icon
19that's labeled 640, you see where its position is on the bar at the bottom of
20the screen? Then if you move to Figure 7 where the user has moved the
21cursor to the right across the screen, so now it's a different icon that's
22enlarges. So, the clock icon over towards the left side is now smaller. And,
23you see now the right side of the screen is filled up because other icons have
24moved to the right basically to accommodate the fact that this new icon has
25been expanded.

1 JUDGE MACDONALD: So, what I'm, what I'm hearing in art of
2discussion of Claim 1, Alms (phonetic sp.) discussion of Claim 1 we
3understood the repositioning that's mentioned there (indiscernible) to makes
4it a little clearer for the record. The icon that's to be expanded, let's call it
5the primary icon and all the other icons are secondary icons. In Claim 1 as
6the primary icon expands, the secondary icons are moved aside.

7 MR. LABARRE: Exactly.

8 JUDGE MACDONALD: And, Claim 35 the repositioning you're
9talking about the secondary icons at that point.

10 MR. LABARRE: That's right.

11 JUDGE MACDONALD: Okay.

12 MR. LABARRE: The movement of those icons -- and that, that
13particular aspect is probably brought out better in the sequence if you use 8-
14A though 8-D.

15 JUDGE HOMERE: But, I believe that the scope of Claim 1 -- of
16Claim 35 seems to be rather broader than that. I think that this is a narrow
17construction; narrow interpretation of Claim 35 here. Another way of
18looking at it, I think, is that as the cursor moves closer to the bar, okay, so
19the icon or the tile that's, that is closest to it pretty much expands.

20 JUDGE MACDONALD: Yeah, I think all -- the bullet point I was
21making was that was the Appellant's interpretation.

22 JUDGE HOMERE: Okay.

23 JUDGE MACDONALD: Sorry. Not that we have to review it
24then --

25 JUDGE HOMERE: Okay.

1 JUDGE MACDONALD: -- only that that was the Appellant --

2 JUDGE HOMERE: Okay.

3 JUDGE MACDONALD: -- knowing their starting position helps
4us --

5 JUDGE HOMERE: Okay.

6 JUDGE MACDONALD: -- clarify what we're -- our thinking and
7when we make a decision.

8 JUDGE HOMERE: I see.

9 MR. LABARRE: Basically, what comes out in the claims there are
10two kinds of behavior, if you will, that primarily characterize what's going
11on; one is the magnification, change in size so that icon that's closest to the
12cursor jumps up to a certain defined maximum size, and then other icons
13adjacent that expand in size. And, the second aspect of the behavior is the
14movement of the icons. So, as one is expanding, the others move away from
15it to accommodate the increased size of that, that first icon. And, that's one
16of the distinctions over the Selker reference is that it doesn't disclose this
17movement of the other icons so that the entire bar is still visible. Rather
18what it does it the one who's expanding, basically, covers up its neighbors as
19it expands more and more.

20 JUDGE MACDONALD: Essentially, you're saying the secondary
21icons in Selker are not deemed to have the same value you're placing on
22them, so they're just covered up?

23 JUDGE BLANKENSHIP: It, it's not so much the value, I think. It's
24just the visual effect that's created. As I said, it's kind of in, in the
25invention, it's kind of this wave. As you move the cursor across you'll see

1the crest of the wave following the cursor. And, so rather than just the one
2cursor or one icon expanding, it's multiple icons. So, it's a more symmetric
3effect. Whereas in Selker, it's just the one that's closest to it expands so you
4can capture that one. Now, what Selker does disclose, is that if you move
5the cursor the distance of one of the unexpanded icons, then the next one
6will roll and expand in its place. And, that's shown with reference to
7Figures 3-A and 3-B. So, they show where they -- essentially the K icon is
8expanded in 3-A and then by moving the cursor slightly to the right, the L
9icon enlarges and the K collapses.

10 JUDGE HOMERE: Going back to Claim 35, would you agree that
11that last step does not actually require that the other icons will be reposition.
12All that's required for this limitation to be met is that once the cursor gets
13close to a particular tile, that tile -- the position of that tile is varied?

14 MR. LABARRE: Well, it doesn't require that it be the one tile that
15it's closest to.

16 JUDGE HOMERE: But it says one tile.

17 MR. LABARRE: Right.

18 JUDGE HOMERE: So, any, any tile.

19 MR. LABARRE: Any tile.

20 JUDGE HOMERE: Including, including the one that's closest to it.

21 MR. LABARRE: Exactly, exactly right, yes.

22 JUDGE HOMERE: Okay. Therefore, would you not agree that
23Selker by itself seems to teach this entire claim as it is?

1 MR. LABARRE: Well, it comes back to that definition of in
2position. My, my interpretation is that it's remaining in the same position.
3It's at the same location, just a bigger size.

4 JUDGE MACDONALD: It's the issue of determining does the
5specification sufficiently limit that term to only the interpretation that the
6Appellant is giving it.

7 JUDGE HOMERE: Okay.

8 JUDGE MACDONALD: Whereas the Examiner's interpretation is
9also valid.

10 MR. LABARRE: I'm not sure the Examiner actually addressed that
11particular issue in the rejection.

12 JUDGE MACDONALD: Well, I would think that their rejection
13doesn't make sense if that's not the interpretation you're giving it. Certainly
14there's --

15 MR. LABARRE: Well, I, I think that's really why the, why she was
16relying on the secondary reference because that does have the concept of
17what they call distortion where some items of data may be expanded and
18other items of data then are moved as a result of that expansion. I think that
19was -- that's my interpretation of the rejection is that the Examiner
20recognized that Selker doesn't disclose either this magnification or this
21change is position and therefore, was relying on the Carpendale (phonetic
22sp.) reference for a teaching of those concepts.

23 JUDGE HOMERE: Well, well the rejection itself was focused
24primarily on Claim 1 and, the secondary reference was relied on for the
25repositioning as, as cited in Claim 1, but as we said that when you get to

1Claim 35 or Claim 128 for instance, you don't really have that explicitly
2recited in those claims. So, I mean, when you put the two references, I
3mean -- I think for Claim 1, when you put the two references together it
4appears that where I could understand the argument that the combination
5itself does not teach the repositioning, but when you get to Claim 35, where
6that does not actually require the repositioning it appears to me the
7combination, notwithstanding what the secondary reference teaches would
8appear to teach Claim 35 and 128 as well.

9 JUDGE MACDONALD: Let me, let me restate that. We didn't
10seem to see it quite as much in the secondary references as you do.

11 MR. LABARRE: Okay. Well, I think that it's coming back to the
12interpretation of the word position.

13 JUDGE MACDONALD: Yes.

14 MR. LABARRE: So, that's obviously one issue that, that will have
15to be resolved in your decision then is how you're going to interpret that
16term. I, I didn't want to jump ahead, but you also mentioned Claim 128.

17 JUDGE HOMERE: Yes.

18 MR. LABARRE: And, and I think that's a very specific claim.

19 JUDGE MACDONALD: Oh, you mean 128?

20 MR. LABARRE: Yes. And, basically what that claim covers is the
21idea that once you bring the cursor within a certain proximity of the menu
22bar, referred to as a threshold distance, the icon jumps up to a maximum
23size. So, it's an immediate going from a, what we call a default size, which
24is a minimum size, up to its maximum size.

25 JUDGE MACDONALD: Turn that, turn that off.

1 MR. LABARRE: And then it stays at that size even as you continue
2to bring the cursor closer. That's quite a bit different from the behavior
3that's disclosed in Selker because what Selker discloses is as you bring the
4cursor closer, the icon continues to grow in size, and that's what Figures 1, 2
5and 3-A showed.

6 JUDGE MACDONALD: We, we -- I'll take this one. We actually
7had a lengthy discussion on this point. In our understanding of, of what is in
8the claim is that the Selker reference teaches exactly what's in the claim
9even though it does other things because the claim only has three steps.
10And, it doesn't preclude other things going on between the steps; for
11example, Selker starts out at a default height. So, it has, we believe, it
12showed Claim 1, first step. As you correctly stated, it then expands up to a,
13you know, a range of sizes. But, at the point where the cursor comes in
14contact with the icon in Selker, it stopped growing; there's a threshold. And,
15then as it goes inside the icon it doesn't get any bigger. It, it stops
16increasing. So, we, we looked through the reference and we looked at the
17claim and we said yes, there is in, in the disclosed invention it goes from,
18you know, from the default height to the maximum. And, Selker progresses
19from one to the other.

20 MR. LABARRE: Right.

21 JUDGE MACDONALD: But, we didn't see the progression was
22precluded by the claim language.

23 MR. LABARRE: Let me just clarify my understanding, then. What,
24what are you saying would be the threshold distance in Selker?

25 JUDGE MACDONALD: It is the boarder of the icon.

1 MR. LABARRE: So, when the, when the cursor touched the edge of
2the icon, that's the threshold?

3 JUDGE MACDONALD: That's the threshold.

4 MR. LABARRE: So, what the claim says is --

5 JUDGE MACDONALD: Even though your disclosure showed the
6threshold outside that area.

7 MR. LABARRE: Right.

8 JUDGE MACDONALD: The claim doesn't --

9 MR. LABARRE: Well, I, I don't --

10 JUDGE MACDONALD: -- say that the threshold --

11 MR. LABARRE: -- dispute that, that particular aspect of it. It's, it's
12the behavior, I think, that's recited in the claim. So, the claim says that
13reversing the order of the words a little bit, but upon detecting the cursor is
14within said threshold distance. So, that's the triggering act. It says,
15increasing the height of at least one of said items closest to said cursor from
16said default right to a fixed maximum.

17 So, in your interpretation, if the cursor is, is touching the icon at the
18point it reaches the threshold, then it doesn't go from the default to the
19maximum as a result of crossing that threshold. It's already at the
20maximum, as you explained. It stops growing at that point.

21 JUDGE HOMERE: But, you start, start off with the default height. I
22mean, once you start, I mean, you look at Selker, you started with the default
23height and, and you have a lot of things that occur in between. I mean a lot
24other sizes --

25 MR. LABARRE: Right.

1 JUDGE HOMERE: -- that occurs in between. And, then by the time
2you touch the tile, and it -- is at the maximum. So, why would that not
3include, encompass starting from the default height that, you know, you
4began with at the outset?

5 JUDGE MACDONALD: I, I think the point is being made is at the
6point the third step is occurring -- I'm sorry, the second step occurs, it's at a
7intermediate height at that point and the third step precludes an intermediate
8height.

9 MR. LABARRE: Right, because it's, it's that language upon
10detecting that the cursor is within said threshold distance. So, that, that is
11when the action occurs going from default to maximum. SO, in the example
12that you just gave, you start from the default when the cursor is still quite a
13ways away. I think they said -- they give like a 8 pints or something like
14that.

15 So, I think in your construction of the claim relative to Selker you
16have to first identify what are you going to call the threshold distance? And,
17then, does Selker teach you that when you hit that threshold distance,
18whatever point you want to take, and what we tried to bring out in the brief
19is you could call it Distance 8. You could call it Distance 2. It's something
20you have to define as the threshold distance. And, as Selker taught, when
21you hit that threshold distance you go from minimum to maximum. And, I
22think we all appreciate Selker doesn't teach that. It teaches a gradual that as
23you bring it closer, you continue to grow it. So, I think it's important in
24interpretation of Claim 128, make sure your're comfortable with what you're

1calling the threshold, and then does it exhibit that claimed behavior when
2you hit the threshold?

3 JUDGE MACDONALD: Yes, it's important to recognize there's a
4difference, and is that difference obvious or unobvious.

5 MR. LABARRE: Right, right.

6 JUDGE BLANKENSHIP: Would you like a moment to sum up?

7 MR. LABARRE: Yes, actually, the, the main point that I wanted to
8bring out is that there are, there are two aspects of the Carpendale reference.
9One is that it's essentially non-analogous art. It doesn't deal with graphical
10user interfaces of the type we're talking about in the invention or in Selker
11where you're selecting a tile to perform some action.

12 With Selker -- I mean, what Carpendale is all about is a viewing tool.
13So, if you look for example at the title, it talks about a viewing tool. And,
14what it's concerned about is when you got large amounts of data, and you
15want to be able to view them related pieces of data in context. So, imagine
16if you would, you have a three dimensional spread sheet. It's lots of
17columns and lots of rows. So, in order to see the whole sheet on one screen,
18you've got to reduce it down to maybe 25 percent zoom ratio. So, you can't
19really make out what's in each cell. So, what basically Carpendale shows
20you is that by focusing on a particular cell, you can grow that one and the
21ones around it will grow because in the context of Carpendale it's important
22to understand --

23 JUDGE MACDONALD: Could I, could I stop you there and ask you
24to move on to your second point?

1 MR. LABARRE: Okay. It kind of relates in a sense that there's no
2 reason to use that in the graphical user interface of the type that Selker is
3 directed to because you're not concerned with contextual viewing when you
4 put icons or buttons on a menu bar or task bar, they're in arbitrary order.
5 You don't care which one is next to the other one. So, you don't have to
6 view them in context. So, the whole idea behind Carpendale, which is to
7 view data in a contextual setting really doesn't apply to Selker because, you
8 know, I would imagine even though I'm on, on your computers you may
9 have cut icons off the screen, but they're not grouped in any particular
10 relationship where you need to see what's next to each one in order to
11 comprehend what the icon is about. These are isolated icons to select
12 individual programs, files, folders. So, the contextual viewing that is the
13 crux of Carpendale really doesn't have any applicability to the menu icon or
14 icon menu of Selker. So, that's what the rejection is lacking is a good
15 identification of a reason for applying Carpendale to Selker. The Examiner
16 gives some reasons in the Office Action and his answer or her answer, but
17 all of those reasons are already met by Selker. You don't need to apply
18 Carpendale to, to meet any of those.

19 JUDGE MACDONALD: So, ultimately, the issue with respect to
20 this reference is, is there sufficient, a sufficient KSR based reason to even
21 look at this reference? And, if you don't include this reference, are -- is
22 there a sufficient teaching in the other references to meet the requirements of
23 KSR?

24 MR. LABARRE: I, I think that's a good way to sum it up, yes.

25 JUDGE BLANKENSHIP: Thank you, Mr. LaBarre.

1 MR. LABARRE: Thank you.

2 JUDGE MACDONALD: We're off the record, now.

3 (Whereupon, the proceedings concluded.)

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